



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Release Number: **200946064**
Release Date: 11/13/09
Date: 08/21/2009
UIL Code: 501.00-00

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Form Required To Be Filed:

Tax Years:

Dear

This is our final determination that you do not qualify for exemption from Federal income tax as an organization described in Internal Revenue Code section 501(c)(3). Recently, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

Because you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

We will make this letter and our proposed adverse determination letter available for public inspection under Code section 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose*, and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

In accordance with Code section 6104(c), we will notify the appropriate State officials of our determination by sending them a copy of this final letter and the proposed adverse letter. You should contact your State officials if you have any questions about how this determination may affect your State responsibilities and requirements.

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your Federal income tax status and responsibilities, please contact IRS Customer Service at 1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

Robert Choi
Director, Exempt Organizations
Rulings & Agreements

Enclosure
Notice 437
Redacted Proposed Adverse Determination Letter
Redacted Final Adverse Determination Letter



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Date: March 04, 2007

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

Legend:

date a =

B =

date c =

D =

E =

Dear

We have considered your application for recognition of exemption from Federal income tax under Internal Revenue Code ("Code") sections 501(a) and 501(c)(3). Based on the information provided, we have concluded that you do not qualify for exemption under Code section 501(c)(3). The basis for our conclusion is set forth below.

On date a, you were incorporated as a nonprofit, public benefit corporation under the laws of the State of B. On date c, you filed Form 1023, *Application for Recognition of Exemption*, under section 501(c)(3) of the Code.

Your purposes, as set forth in your Articles of Incorporation, are to establish a county-wide high speed telecommunications network to be used (1) to extend and enhance teaching and learning opportunities for all residents of your county; (2) to provide on demand access for medical practitioners to all relevant medical information, and to enable participation in state-of-the-art telemedicine training and educational opportunities; (3) to provide community-wide access for local businesses to enable enhanced conduct of business; and (4) to enhance and expand community services by providing on-demand information access and high-speed communication involving data and video.

Your primary activity will be the development and operation of a high speed communications network to bring broadband connectivity to your community. This network will be comprised of a fiber backbone to service high-bandwidth users, and wireless broadband connectivity technologies to service lower bandwidth users. The network will be used primarily to access the commercial Internet. In addition, it will be used for accessing educational resources, full-motion interactive video and video conferencing, electronic health record exchange, remote diagnostic and monitoring services, and transmission of business and administrative data, including claims and billing information for a local hospital.

Your revenues will be derived primarily from service fees charged for use of the network. You will set fees to cover the costs of day-to-day operations, including personnel, network maintenance, and expansion of network infrastructure. You will charge users different fees for

different uses of the network. Users of the network will include government organizations, schools, nonprofit hospitals, other nonprofit organizations, public school students and their parents, health care workers, and for-profit businesses.

You indicate that your primary competitors in the community will be D, a for-profit entity that provides cable-modem services, and E, a for-profit entity that provides telecommunications services.

Law

An organization described in section 501(c)(3) of the Code must be, among other requirements, organized and operated exclusively for certain purposes. Section 1.501(c)(3)-1(a)(1) of the Income Tax Regulations ("regulations") states:

In order to be exempt as an organization described in section 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

Section 1.501(c)(3)-1(b)(1)(i) of the regulations states:

An organization is organized exclusively for one or more exempt purposes only if its articles of organization . . . :

- (a) Limit the purposes of such organization to one or more exempt purposes; and
- (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

Section 1.501(c)(3)-1(b)(1)(iii) of the regulations states:

An organization is not organized exclusively for one or more exempt purposes if its articles expressly empower it to carry on, otherwise than as an insubstantial part of its activities, activities which are not in furtherance of one or more exempt purposes, even though such organization is, by the terms of such articles, created for a purpose that is no broader than the purposes specified in section 501(c)(3). Thus, an organization that is empowered by its articles to engage in a manufacturing business, or to engage in the operation of a social club does not meet the organizational test regardless of the fact that its articles may state that such organization is created for charitable purposes within the meaning of section 501(c)(3) of the Code.

Section 1.501(c)(3)-1(b)(1)(iv) of the regulations states:

In no case shall an organization be considered to be organized exclusively for one or more exempt purposes, if, by the terms of its articles, the purposes for which such organization is created are broader than the purposes specified in section 501(c)(3).

Section 1.501(c)(3)-1(c)(1) of the regulations states:

An organization will be regarded as “operated exclusively” for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Section 1.501(c)(3)-1(d)(1)(i) of the regulations states, in part, that an organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for charitable or educational purposes.

Section 1.501(c)(3)-1(d)(2) of the regulations states, in part, that the term “charitable” in section 501(c)(3) of the Code includes relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes.

Section 1.501(c)(3)-1(d)(3)(i) of the regulations states, in part, that the term “educational” in section 501(c)(3) of the Code relates to the instruction of the public on subjects useful to the individual and beneficial to the community.

Rev. Rul. 69-528, 1969-2 C.B. 127, holds that an organization regularly carrying on an investment service business to tax-exempt organizations is not exempt under section 501(c)(3) of the Code. This revenue ruling points out that providing investment services on a regular basis for a fee is a trade or business ordinarily carried on for profit. If such investment services were regularly provided by a tax-exempt organization, such activity would constitute an unrelated trade or business even if it were provided only to tax-exempt organizations.

Rev. Rul. 72-369, 1972-2 C.B. 245, describes an organization formed to provide managerial and consulting services for nonprofit organizations to improve the administration of their programs. Its primary activities were to enter into agreements with unrelated exempt organizations to provide managerial and consulting services on a cost basis. The ruling held that the organization was not exempt because its primary activity of providing managerial and consulting services for a fee was a trade or business ordinarily carried on for profit. The fact that services were provided at cost solely to exempt organizations was not sufficient to characterize the activity as charitable within the meaning of section 501(c)(3) of the Code.

Rev. Rul. 74-614, 1974-2 C.B. 164, describes an organization which operated a regional computer network to collect and disseminate scientific and educational information among member educational institutions. The organization's computer network was not designed for high speed batch programs, and was not used for administrative matters such as scheduling, billing, or processing. The ruling concluded that by providing a coordinated program which enabled its member institutions to benefit from the research and scientific projects developed by other members, the organization was advancing education.

Rev. Rul. 81-29, 1981-1 C.B. 329, describes an organization that developed a computer network to provide bibliographic information to its member libraries. The organizations did not provide other services, such as routine administrative functions, to its member libraries. By making useful bibliographic information available to researchers, the organization advanced education and qualified for exemption under section 501(c)(3) of the Code.

In B.S.W. Group, Incorporated v. Commissioner, 70 T.C. 352 (1978), the Tax Court considered the qualification for exemption under section 501(c)(3) of the Code of an organization formed to provide consulting services for a fee to nonprofit and tax exempt organizations. In concluding that the organization did not qualify for exemption, the court noted that

[T]he critical inquiry is whether petitioner's primary purpose for engaging in its sole activity is an exempt purpose, or whether its primary purpose is the nonexempt one of operating a commercial business producing net profits for petitioner. . . . Factors such as the particular manner in which an organization's activities are conducted, the commercial hue of those activities, and the existence and amount of annual or accumulated profits are relevant evidence of a forbidden predominant purpose.

In Better Business Bureau of Washington D.C., Inc. v. United States, 326 U.S. 279 (1945), the Supreme Court held that the presence of a single non-exempt purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly exempt purposes. The Court found that a trade association had an "underlying commercial motive" that distinguished its educational program from that carried out by a university, and therefore the association did not qualify for exemption.

RATIONALE

Organizations described in section 501(c)(3) of the Code must be organized and operated exclusively for one or more exempt purposes specified in the regulations, which include charitable or educational purposes. See section 1.501(c)(3)-1(d)(1) of the regulations.

To be organized exclusively for one or more exempt purposes, an organization's articles of organization must limit its purposes to one or more exempt purposes, and must not expressly empower the organization to engage, other than as an insubstantial part of its activities, in activities which do not further one or more exempt purposes. See section 1.501(c)(3)-1(b)(1)(i) of the regulations.

You are not organized exclusively for one or more exempt purposes because your Articles of Incorporation recite that you are organized for purposes that are broader than those specified in section 501(c)(3). See sections 1.501(c)(3)-1(b)(1)(i), (iii) and (iv) of the regulations. In particular, establishing a high speed telecommunication network to provide community-wide access for local businesses to enable enhanced conduct of business is not an exempt purpose under section 501(c)(3) of the Code.

To be operated exclusively for one or more exempt purposes, an organization must engage primarily in activities that accomplish one or more exempt purposes. However, if more than an insubstantial part of the organization's activities is not in furtherance of an exempt purpose, it is not engaged primarily in activities that accomplish an exempt purpose. See section 1.501(c)(3)-1(c)(1) of the regulations.

As a general rule, providing services of an ordinary commercial nature in a community, even though the undertaking is conducted on a nonprofit basis and is beneficial to the community, is not regarded as conferring a charitable benefit on the community unless the service directly accomplishes a tax-exempt purpose.

Based on the information you have submitted, your provision of high speed telecommunication network services will not primarily accomplish charitable or educational purposes. Although you will provide access to and facilitate the exchange of educational information, as in Rev. Rul. 74-614 and Rev. Rul. 81-29, both *supra*, unlike the organizations in those rulings you will also provide access to and facilitate the exchange of billing and claims data, administrative data, communications by and to for-profit businesses in your community, and other personal access to and use of the Internet. You will provide these services to individuals, government organizations, nonprofit corporations, and for-profit corporations in exchange for a fee. Your primary competitors that provide telecommunications services in your county are two for-profit entities, E and D. Thus, similar to the consulting services provided to nonprofit, tax-exempt organizations described in Rev. Ruls. 69-528 and 72-369, both *supra*, and B.S.W. Group, Incorporated, *supra*, your provision of services is a trade or business ordinarily carried on for-profit that does not primarily serve a charitable or educational purpose. See sections 1.501(c)(3)-1(d)(2) and 1.501(c)(3)-1(d)(3) of the regulations. Rather, it serves a substantial non-exempt commercial purpose.

Because your activities will serve a substantial non-exempt purpose, you are not operated exclusively to further an exempt purpose. See section 1.501(c)(3)-1(e)(1) of the regulations; Better Business Bureau, Inc., *supra*. Because you are neither organized nor operated exclusively for exempt purposes, you do not qualify for exemption under section 501(c)(3) of the Code.

Accordingly, contributions to you are not deductible under section 170 of the Code, and you must file federal income tax returns.

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination

Your protest statement should be accompanied by the following declaration:

Under penalties of perjury, I declare that I have examined this protest statement, including accompanying documents, and, to the best of my knowledge and belief, the statement contains all the relevant facts, and such facts are true, correct, and complete.

You also have a right to request a conference to discuss your protest. This request should be made when you file your protest statement. An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you. If you want representation during the conference procedures, you must file a proper power of attorney, Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. For more information about representation, see Publication 947, *Practice before the IRS and Power of Attorney*. All forms and publications mentioned in this letter can be found at www.irs.gov, Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to protest as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for

the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848 and any supporting documents to this address:

Internal Revenue Service
TE/GE (SE:T:EO:RA:T:1)
Stephen M. Clarke
1111 Constitution Ave, N.W. (PE-3Q2)
Washington, DC 20224

You may also fax your statement to the person whose name and fax number are shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he received your fax.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

Robert Choi
Director, Exempt Organizations
Rulings & Agreements